91-103

(2)

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF INDIANA, Petitioner

v.

DEAN SHANE DOWELL, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF INDIANA

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF CASE

Dean Shane Dowell was charged and convicted of forgery and theft in Morgan County, Indiana. At his initial hearing on June 19, 1989, the trial court informed Dean Dowell of the charges against him and of his constitutional rights. Dowell advised the court he was in the process of obtaining private counsel.

On July 6, 1989, the Magistrate held a hearing regarding Dowell's representation at which time Dowell rejected the appointment of pauper counsel (Record pp. 212-216). Instead, Dowell asserted that if he could not retain private counsel, he would "talk for himself..." (Record p. 216). The Magistrate informed Dowell that he had that right; however, the Magistrate did not make any further inquiries and said nothing about the dangers and disadvantages

of self-representation (Record p. 216).

The Court appointed pauper counsel on July 17, 1989 (Record p. 20). Dowell rejected the appointed counsel and the court was notified of the rejection by counsel on October 13, 1989. Counsel then remained as standby counsel pursuant to the July 17, 1989 order (Record p. 20).

On October 24, 1989, before voir dire began, the court questioned Dowell on his wish to proceed pro se (Record pp. 220-221). The record states as follows:

> The Court: First of all, you have chosen to represent yourself in this case. Is that correct?
> Mr. Dowell: Yes Sir.
> The Court: There's been a prior record made of that, I think, by the Court's Magistrate. . . .

(Record p. 220.)

The court then informed Dowell of the responsibilities of his standby counsel (Record pp. 221-222), and told Defendant

that he was bound by the same procedures and rules as a lawyer (Record pp. 222-223). The court then explained in detail the process of voir dire to the Defendant (Record pp. 224-226), and informed Dowell of the general pattern of the trial process (Record pp. 226-229). The court finished instructing Dowell by stating that the court would not be in a position to answer the Defendant's questions (Record p. 229), and he also admonished Dowell on his conduct in the courtroom, (Record pp. 237-238). The court did not attempt to gain any background information or advise the Defendant of the dangers and disadvantages he would risk by representing himself.

Dowell was then allowed to proceed pro se. He was found guilty on both charges. On appeal, the Court of Appeals of Indiana ordered a new trial on the grounds that

Dowell did not knowingly, intelligently and voluntarily waive his right to counsel. The Supreme Court of Indiana subsequently denied transfer without opinion on April 12, 1991, and the State of Indiana then filed their Petition for Writ of Certiorari with the Clerk of the United States Supreme Court.

REASONS WHY THE PETITION SHOULD BE DENIED

1. THE DECISION BELOW DOES NOT RAISE THE QUESTION PRESENTED IN THE PETITION

The Question Presented in the State's petition is whether Faretta v. California, 422 U.S. 806 (1975), "requires a court to conduct a special inquiry or colloquy to determine whether a criminal defendant is making a knowing and intelligent waiver of counsel in favor of self-representation." However, the Court of Appeals of Indiana

did not specifically decide that question in this case.

This Court in Faretta, supra, required that the defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" Faretta, 422 U.S. at 835. The State of Indiana argues that the Indiana Court of Appeals has required a searching and extensive advisement as a prerequisite to self-representation.

The Indiana courts have not, however, required a specific inquiry or colloquy in all circumstances. The Court of Appeals stated that: "Waiver of assistance of counsel may be established based upon the particular facts and circumstances surrounding the case, including the

background, experience, and conduct of the accused." Dowell v. State, 557 N.E.2d 1063, 1066 (Ind. App., 1990) (citing Jackson v. State, 441 N.E.2d 29 (Ind. App., 1982)); State's Petition, p. A-5. When background experience and conduct "do not clearly indicate waiver, the trial court, with reference to the above guidelines, must make an inquiry sufficient to establish a knowing, voluntary, and intelligent waiver of the right to counsel." Id. at 1067; State's Petition, p. A-7.

This opinion was recently affirmed in Leonard v. State, 573 N.E.2d 463 (Ind. App., 1991). There, the Indiana Court of Appeals again stated that the trial court must make an inquiry following the specific guidelines listed in Dowell if the defendant's background, experience, and

conduct do not show a waiver which is knowing, voluntary, and intelligent. Id. at 465.

It is clear that any requirement of a specific inquiry or colloquy is only required if a sufficient "eyes open" waiver is not established by the defendant's background, experience, and conduct.

Thus, the Question Presented by the State of Indiana was in fact required only as a secondary requirement if the first test of background, experience, and conduct are not sufficient. And as a secondary requirement the guidelines promulgated in Dowell would not be appropriate for review by this Court.

2. THE INDIANA COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH THE CASES CITED BY THE PETITIONER.

The decision reached by the Indiana Court of Appeals is not in conflict with

the cases cited by Petitioner. An analysis of even the most lenient of those cases, which include those jurisdictions holding no deliberate and searching inquiry or colloquy necessary, would have led to the same result.

In the instant case, the Indiana Court of Appeals was dealing with a silent record as to the Defendant's background, experience, his awareness of the benefits legal counsel could provide, and the importance of those benefits at trial. "Presuming waiver from a silent record is impermissible." Carnley v. Cockran, 369 U.S. 506, 516; See also Jackson v. State, 441 N.E.2d 29 (Ind App., 1982). None of the jurisdictions cited by the State in its petition hold that a waiver may be established by a silent record. Therefore, no real conflict exists between those

decisions and the decision by the Indiana Court of Appeals in this case. Thus it is not appropriate for this Court to decide whether or not a searching inquiry or colloquy is required under Faretta in the instant case, because this is not a case which is in conflict with the other jurisdictions.

CONCLUSION

Respondent respectfully prays that this Court deny the State of Indiana's petition for writ of certiorari to the Court of Appeals of Indiana.

Respectfully submitted

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